

“Spotting and Evaluating Issues on Appeal”

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Opening Comments

Importance of appeals, importance of issue spotting, importance of developing appellate skills

Caveat about state law/rules for appeals

This training will provide a basic overview

Techniques for Determining Issues on Appeal

Talk to trial counsel

Talk to client

Review transcripts and complete record with fine-toothed comb

Review key cases in your jurisdiction, Supreme Court case law

Look at cases elsewhere for ideas

Comprehensive understanding of state and federal child welfare laws

Spotting Issues

Basic Issues

Evidentiary Errors

Types

Connecting errors to findings

Spotting Issues

Trial court's findings

Standard for challenging findings of fact

Types of errors

- Judge made simple mistake

- Judge ignored overwhelming contrary evidence

- No properly-admitted evidence supports finding

Spotting Issues

Conclusion of unfitness

Findings as a whole do not add up to clear and convincing evidence of unfitness.

No nexus between parent's "problem" and harm to child

Improper legal standard applied

Not "clear and convincing evidence"

Burden-shifting to parent to prove fitness

Other

Spotting Issues

Constitutional Issues (State or Federal)

Substantive and Procedural Due Process

Right to Counsel

Equal Protection

Others

Spotting Issues

Violations of Federal and State Statutes

ASFA/ICWA/CAPTA/Fostering Connections/ADA

Reasonable efforts

ICPC

Funding Statutes v. Enforceable Rights

Preserving Issues

Is the issue preserved?

Most issues must be “preserved” at trial level

Preservation = issue must be raised first before trial judge

Gives trial judge chance to “fix” problem (if it needs fixing)

Preserving Issues

How does trial counsel preserve issues?

Objections

Offers of proof

Preserving Issues

Objections – Did trial counsel object?

Specificity

Timing

Running/ongoing objections permitted?

Preserving Issues

Offer of proof – Did trial counsel make one?

Oral

Written (affidavit of counsel or witness)

Preserving Issues

Offer of proof

Content of offer of proof

Identify error of law

- Why was the document admissible?
- Why did trial counsel have the right to call the witness?

Identifying information that *would have been* admitted or excluded if the judge had ruled correctly.

- What would witness have said if judge had properly allowed further examination?
- What would witness have said if judge had properly allowed counsel to call her?
- What would document have shown had judge properly admitted it?

Preserving Issues

If issue not preserved

Arguing unpreserved issues - What is legal standard in your jurisdiction?

“Extraordinary circumstances”

“Plain error”

“Risk of substantial harm”

“Substantial risk of miscarriage of justice”

Preserving Issues

Can appellate counsel preserve or “create” the issue?

Post-trial motions

- Motions for new trial (Ineffective assistance, other reasons)

- Other post-trial motions

- Danger that issue preserved only for appeal of denial of post-trial motion but not preserved for purposes of original appeal of termination.

Preserving Issues

Does the particular issue *need* to be preserved?

Jurisdiction

In some states, ineffective assistance

Certain ICWA issues

Other

Evaluating Issues

Harmless errors

What is “harmless error?”

Appellate courts only care about the mistakes that matter

Which errors matter? Ones that call the final result into question.

Evaluating Issues

Harmless Error Analysis

Can you track the mistake to the final result and show that the mistake affected the result?

If it didn't affect the result, error was harmless.

If error was harmless, it is *almost* never worth arguing on appeal.

Evaluating Issues

Types of harmless errors

Harmless Error 1. Trial court erred in admitting evidence but made no finding based on that evidence.

Ex: Trial court erred in admitting child sexual abuse hearsay but made no findings about sexual abuse.

Evaluating Issues

Types of harmless errors:

Harmless Error 2. Trial court made finding based on improperly-admitted evidence but other evidence (properly admitted) supports the finding.

Ex: Trial court erred in admitting child sexual abuse hearsay but properly admitted certified copy of Father's conviction for sexually abusing child.

Evaluating Issues

Types of harmless errors

Harmless Error 3. Even if the finding is not supported by properly-admitted evidence, that finding is not important to the conclusion of unfitness.

Ex: Trial court made finding about sexual abuse based purely on improperly-admitted evidence. But even without that finding, the court had ample evidence of physical abuse, made findings about physical abuse, and relied primarily on physical abuse to terminate Father's rights.

Evaluating Issues

Is the issue one that doesn't implicate a harmless error analysis (a/k/a "structural error")?

Do you *need* to show harm?

Is the error so basic to fundamental rights or so basic to a fair trial that the error can't be harmless?

State law question whether structural error analysis applies in civil cases.

Evaluating Issues

Is the issue one that doesn't implicate a harmless error analysis (a/k/a "structural error")?

Types of structural errors:

Counsel issues

Judicial bias

Evaluating Issues

Counsel Issues

Denial of counsel (where there is right)

Counsel not appointed

Counsel improperly struck

Counsel improperly waived

Evaluating Issues

Counsel Issues

Constructive denial of counsel

Attorney appointed so close to trial that he/she could not possibly provide any meaningful assistance.

Attorney not member of bar, fraudulently obtained license, not certified to take case (in states where certification necessary).

Attorney slept through trial or missed significant portions of trial.

Attorney did absolutely nothing on case (but must distinguish from run-of-the-mill ineffective assistance).

Attorney had conflict of interest.

Evaluating Issues

Judicial bias

Close personal/professional relationship with party or attorney

Information from extra-judicial sources

Prejudice against class

Extreme behaviors calling into question judge's role as impartial arbiter

Questions/Comments

- Feel free to contact me with questions
- Use the ABA parents' attorneys list serv
- More information at
http://new.abanet.org/child/Pages/parentrepresentation_home.aspx